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IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY AND R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

RONALD ACCORD, JR., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS WEST VIRGINIA

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF Ciba CORPORATION, CHEMTALL INCORPORATED, CYTEC INDUSTRIES INC., G.E. BETZ, INC., AND ZINKAN ENTERPRISES INC. IN SUPPORT OF PETITIONERS

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Pursuant to Supreme Court Rule 37.2(a), movants Ciba Corporation, Chemtall Incorporated, Cytec Industries, Inc., G.E. Betz, Inc., and Zinkan Enterprises Inc., request leave to file the accompanying Brief Amici Curiae in Support of Petitioners.* Movants' brief brings

* Counsel for Amici Curiae provided timely notice of intent to file the accompanying brief to Counsel of Record for both Petitioners and Respondents on January 4, 2008. Petitioners (Cont'd)

to the attention of the Court a relevant matter that will be of considerable help in considering the Petition, *see* Sup. Ct. R. 37.1 – namely, that the unconstitutional proceeding described in the Petition has been repeatedly blessed by the West Virginia state courts. The breadth of this problem is further reason to grant the Petition.

Like Petitioners, Movants are defendants in tort litigation currently pending in West Virginia state court. Movants' experience in that separate litigation demonstrates the "increasing frequency," Pet. at 2, and startling scope of West Virginia's disregard for this Court's punitive damages jurisprudence. The accompanying brief describes how the constitutionally deficient punitive damages procedures employed in Petitioners' case have been extended by West Virginia courts into other contexts. It also illustrates how the West Virginia Supreme Court of Appeals shows no interest in preventing further growth in the use of these procedures and indeed appears to be fully supportive of them.

Movants are manufacturers, distributors and sellers of a beneficial water treatment chemical used, *inter alia*, to recycle water in coal processing operations. They have been sued in West Virginia Circuit Court by a putative class of coal preparation plant workers who allege exposure to the water cleaner. *See Stern v. Chemtall*, No. 03-C049M (W.Va. Marshall County Cir. Ct. April 1, 2003). The *Stern* plaintiffs seek medical monitoring

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(Cont'd)
consented to the filing of the attached brief in a letter that has been lodged with the Clerk of this Court. Respondents' counsel refused consent.

and punitive damages on a class-wide basis.** As in Petitioners' case, the trial court adopted a case management plan which bifurcated punitive damage issues – the availability of punitive damages and a punitive damages multiplier – from logically precedent issues relating to liability. Thus, the parties will litigate class certification and liability, if any, for medical monitoring only after completion of the punitive damages trial phase. Memorandum Order (January 9, 2007). The West Virginia Supreme Court of Appeals allowed this trial plan to stand when it denied a writ of prohibition in a published opinion. *State ex rel. Chemtall Inc. v. Madden*, No. 33380, 2007 WL 4098937 (W.Va. Nov. 15, 2007).

Movants will themselves seek a writ of certiorari in this Court in a timely manner. They support the petition here in order to highlight the imperative need for this Court's intervention. As these cases demonstrate, the courts of West Virginia continue to apply facially defective methodologies for calculating punitive damages in mass tort litigation. Such "reverse bifurcated trials," which calculate punitive damages before individualized factors such as causation, put the cart before the horse. The increasing reliance on this constitutionally deficient procedure creates the risk that punitive damages will be assessed without regard to any individual plaintiffs' actual harm, as required by this Court's decisions in *State Farm Mutual Automobile Insurance Co. v.*

** Movants, Ciba Corporation and Cytec Industries, Inc. have also been sued in West Virginia Circuit Court by a separate putative class of coal preparation workers. *See Pettry v. Peabody Holding Co.*, No. 02-C-58 (W. Va. Marshall County Cir. Ct. March 28, 2002). Two *Pettry* plaintiffs have intervened in *Stern*. The trial plan discussed herein was entered in *Stern* only.

Campbell, 538 U.S. 408 (2003) and *Philip Morris USA Inc. v. Williams*, 127 S. Ct. 1057 (2007). Immediate review is warranted before these unconstitutional proceedings go forward. They threaten to distort the litigation process in a manner that cannot be corrected on appeal, as Justice Benjamin noted in his dissent from the West Virginia Supreme Court of Appeals' denial of the writ of prohibition. *Chemtall*, 2007 WL 4098937 at *5 (Benjamin, J., concurring in part and dissenting in part).

Accordingly, Movants respectfully request the opportunity to set forth more fully the growing problem in West Virginia that justifies the grant of the Petition.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amici Curiae Ciba Corporation, Chemtall Incorporated, Cytec Industries Inc., G.E. Betz, Inc., and

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their (Cont'd)

Zinkan Enterprises Inc. file this brief in support of Petitioners to emphasize the mounting constitutional inequities facing mass tort defendants in the determination of punitive damages by the courts of West Virginia. Petitioners have cogently explained the need for this Court's intervention to correct an unconstitutional approach to the adjudication of punitive damages claims that the West Virginia courts employ with "increasing frequency." Pet. at 2. Amici explain herein that the problems identified in the Petition are neither isolated nor likely to be resolved by the West Virginia Supreme Court of Appeals.

Like Petitioners, Amici Curiae are currently defendants in mass tort litigation seeking punitive damages in West Virginia state trial court. Amici are manufacturers, distributors and sellers of polyacrylamide, a chemical used to purify drinking water and treat waste water. Polyacrylamide has numerous beneficial uses, including the cleaning of water used in coal processing operations. The substance separates coal sediment from process water, thereby preventing pollution of streams and rivers and permitting the recycling of the water. The safety of polyacrylamide products has been repeatedly assessed by regulatory agencies throughout the world, which have found them to be safe and appropriate for these applications.

Amici have been sued in a putative class action pending in Marshall County Circuit Court. *See Stern v. Chemtall*

(Cont'd)
counsel made a monetary contribution to its preparation or submission. The Petitioners have consented to the filing of this brief. The Respondents have withheld their consent.

Inc., No. 03-C-49M (W.Va. Marshall County Cir. Ct. April 1, 2003) ("*Stern*"). This action asserts theories of strict liability against Amici for their sale of and conduct with respect to polyacrylamide products used in coal preparation.[2] Although no class has been certified, plaintiffs seek class-wide relief in the form of medical monitoring pursuant to *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (W.Va. 1999).[3] Most relevant here, they also seek punitive damages.

This case vividly demonstrates West Virginia's growing disregard for this Court's punitive damages jurisprudence. As in the case under review, the case management order in *Stern* requires the jury to determine both punitive damages liability and a punitive damages multiplier before *any* facts are developed regarding the individual experience of *any* single plaintiff. Remarkably, the case management order will require the jury to assess the availability and the degree of punitive damages before it is determined whether a) a class can be certified; b) whether a single defendant is liable to any plaintiff; or c) whether any plaintiff is entitled to

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2. Amici Ciba Corporation and Cytec Industries, Inc., have also been sued in a separate class action brought by a putative class of coal preparation plant workers, two representatives of which have intervened in *Stern*. *Pettry v. Peabody Holding Co.*, No. 02-C-58, (W. Va. Marshall County Cir. Ct. March 28, 2002) ("*Pettry*"). A third plaintiff, purporting to represent a putative class from a separate water treatment industry, has also intervened in the *Stern* action. The trial plan at issue discussed in this brief applies only to the *Stern* matter.

3. A medical monitoring claim under *Bower* imposes liability not for actual harm but for increased risk of future disease. *Bower*, 206 W. Va. at 142, 522 S.E.2d at 433.

medical monitoring due to an increased risk of future disease.

Amici's trial plan order provides significant insight into both the substantive problem facing mass tort defendants in West Virginia courts and the failure of the West Virginia Supreme Court of Appeals to address the problem. That court recently denied review of Amici's petition for a writ of prohibition, concluding that the trial plan "does not guarantee a result at odds with" this Court's decisions. *Chemtall v. Madden*, No. 33380, 2007 WL 4098937 at *4 (W.Va. Nov. 15, 2007) (citing *Philip Morris USA Inc. v. Williams*, __ U.S. __, 127 S. Ct. 1057 (2007)). While Amici intend to seek certiorari to ask this Court to review that decision, this Petition may be resolved before Amici's petition is fully briefed.[4] Accordingly, Amici have a strong interest in ensuring that this Court has the benefit of Amici's experience in considering the Petition.

SUMMARY OF ARGUMENT

This court should grant the Petition to correct West Virginia's repeated use of a constitutionally deficient punitive damages procedure. This procedure is gaining increasing currency in the courts of West Virginia, a magnet jurisdiction for mass tort litigation. As Amici's experience suggests, the West Virginia Supreme Court of Appeals has shown no willingness to set matters right. Thus, an increasing number of mass tort defendants are likely to be subjected to liability for punitive damages before any demonstration of the basic elements of liability and causation on plaintiffs' underlying claims. The trial order

4. Amici's petition is currently due on February 13, 2008.

in Amici's cases illustrates the broad reach of the procedure challenged in the Petition. The trial order applies the "punitives first" bifurcation procedure to a putative class action seeking only equitable relief in the form of medical monitoring. Not only is this methodology wholly inconsistent with the due process precedent of this Court, it is also unlikely to be corrected in the absence of action by this Court. The issue is ripe for review, and the Petition should be granted.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO CURTAIL THE EXPANDING USE OF CONSTITUTIONALLY DEFECTIVE PUNITIVE DAMAGES PROCEDURES IN WEST VIRGINIA COURTS

West Virginia courts have drawn widespread criticism for their handling of mass tort claims. *See* Pet. at 25 & n.6. The bifurcated punitive damages procedure challenged in the Petition further supports a perception that a corporate defendant is at an unfair disadvantage litigating in the courts of West Virginia. This procedure, imposed with increasing frequency in the state disregards this Court's guidance regarding the constitutionally mandated safeguards for imposing punitive damages. *See BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); *Philip Morris*, 127 S. Ct. 1057.

The Petition provides but one example of the West Virginia courts' unwillingness to follow this Court's due process jurisprudence. As Amici's experience

demonstrates, the constitutional conundrum highlighted in the Petition is not isolated, but has spread into broader contexts in West Virginia courts – with no end in sight. The West Virginia Supreme Court of Appeals has shown no interest in addressing these problems. Its inaction ensures that mass tort defendants will face hopelessly dysfunctional punitive damage proceedings, in which basic notions of procedural fairness are disregarded for the sake of expediency.

While hardly unique in West Virginia mass tort cases,[5] the trial plan applicable to Amici is illustrative of the problem. Amici produce and sell a beneficial chemical substance that has never been determined to have harmed any person or even to possess the potential to cause harm. Nevertheless, they are now being forced to litigate their liability for punitive damages and an across-the-board multiplier for punitive damages, before being given an opportunity to dispute threshold issues of class certification, causation and liability for the medical monitoring that plaintiffs seek.

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5. West Virginia has already employed a reverse bifurcation format in several different asbestos matters involving the claims of approximately 30,000 plaintiffs. *See In re Asbestos Cases*, No. 89-C-999 (W. Va. Kanawha County Cir. Ct. Feb. 15, 1989); *In re Asbestos Cases II*, No. 91-C-7777 (W. Va. Kanawha County Cir. Ct. Mar. 13, 1991); *In re Asbestos Cases III*, No. 92-C-8888 (W. Va. Kanawha County Cir. Ct. Feb. 6, 1992); *In re Asbestos Personal Injury Litigation*, No. 02-C-9004 (W. Va., Mongolia County Cir. Ct. Sept. 23, 2002); *In re Asbestos Personal Injury Litigation*, No. 03-C-9800 (W. Va., Kanawha County Cir. Ct. Feb. 11, 2003). As Petitioners and Amici demonstrate, West Virginia recently expanded this trial format well outside of the asbestos arena. *See also Leach v. E.I. DuPont de Nemours & Co.*, No. 01C-608 (W. Va., Wood County Cir. Ct. Aug. 30, 2001) (asserting a claim for medical monitoring for chemical exposure).

The *Stern* plaintiffs seek recovery in strict liability against Amici for their sale of polyacrylamide, a substance that facilitates separation of solids suspended in liquid waste streams. In preparing coal for market, rock and sediment must be separated from usable coal, a process that results in a large amount of dirty waste water. Polyacrylamide products separate solid particles from this waste water, permitting reuse of the cleaned water and avoiding the pollution of rivers and streams that was once common in coal processing. Plaintiffs allege that a trace residual chemical in polyacrylamide, known as acrylamide, is likely to cause future diseases warranting medical monitoring. Plaintiffs' claims are undercut by the findings of regulatory agencies around the world, which have found no risk to human health presented by the trace amounts of the substance in the products at issue.

On January 9, 2007, over the objection of the Amici, the Circuit Court of Marshall County entered a case management order bifurcating issues of product defect and punitive damages from class certification and medical monitoring. Mem. Order of Jan. 9, 2007.[6] In Phase I, the parties will try issues relating to plaintiffs' strict liability theories.[7] On that basis alone, the court will then inquire

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6. The relevant portions of this Memorandum Order have been attached as an addendum for the convenience of the Court. App. at 1(a).

7. The Order sets several strict liability issues for trial in Phase I, including whether the defendants had actual or constructive knowledge of the alleged hazard posed by their products; whether the state of medical, scientific, and industry knowledge throughout the time of alleged exposure could have

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"whether or not the Defendants, or any of them, acted in such a manner as to justify punitive damages," and, if so, "what multiple of general damages would suffice as a deterrent of future actions against that particular Defendant." App. at 4(a). Only upon completion of the trial for punitive damages will the court hear in Phase II "issues of medical causation, medical monitoring viability, and damages." *Id.* In short, punishment will be assessed in the abstract, without any actual finding as to what, if any, wrongful actions must be deterred.

As this Court has repeatedly stressed, however, the determinations of liability for, and the amounts of, punitive damages depends on the facts of a particular case, including the circumstances surrounding an individual plaintiff's purported injury. *See, e.g., State Farm*, 538 U.S. at 418 (requiring consideration of "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"); *id.* at 425 ("The precise award [of punitive damages] in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."). The Due Process Clause requires that a court "avoid procedure that unnecessarily deprives juries of proper legal guidance," so that the juries "are not asking the wrong question." *Philip Morris*, 127 S. Ct. at 1064.

(Cont'd)
reasonably foreseen that persons working with the products were at risk to sustain injury as a result of the exposure; whether the defendants properly tested their products; whether the products are unreasonably dangerous; and issues of warning, proper instruction, and provision of protective devices. App. at 2(a).

By putting liability and multipliers for punitive damages before the logically and legally precedent questions of injury and causation, these trial management orders create precisely the jury confusion that due process prevents. Under this procedure, juries are left to determine eligibility for punitive damages and the amount by which all plaintiffs' awards should be enhanced before they determine whether a single plaintiff has prevailed against any defendant. *See Philip Morris*, 127 S. Ct. at 1063 (discussing danger of jury speculation on issues such as: "How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur?"). Such a procedure recalls the Queen of Hearts' pronouncement, "Sentence first – verdict afterwards." Lewis Carroll, *Alice's Adventures in Wonderland* 83 (Philip Smith ed., Dover Publications 1993)(1898).

While Amici's and Petitioner's cases raise the same constitutional infirmity, the differences between the underlying claims demonstrate the seemingly limitless applicability of the defective bifurcation procedure. The trial plan confronting Amici does not involve claims for compensatory damages. It only presents claims for equitable relief in the form of medical monitoring. Plaintiffs are also permitted to seek punitive damages for a class of plaintiffs without being required to prove the prerequisites of class certification. The trial court's order demonstrates the pressing need for corrective action by this Court.

II. MASS TORT DEFENDANTS ARE UNLIKELY TO OBTAIN RELIEF FROM CONSTITUTIONALLY DEFECTIVE PUNITIVE DAMAGES PROCEDURES IN THE ABSENCE OF ACTION BY THIS COURT

The West Virginia Supreme Court of Appeals has shown no inclination to correct the constitutionally defective procedures for punitive damages employed by West Virginia trial courts, including the reverse bifurcation at issue here. Mass tort defendants are left without recourse for the injuries that arise from the unconstitutional design of the proceedings. This upside down structure has *in terrorem* effects. Faced with the threat of a punitive damages determination before being permitted a chance to rebut plaintiffs' claims of injuries, mass tort defendants are under tremendous pressure to settle early. Under these circumstances, this Court's immediate review is necessary.

In the case under consideration, the West Virginia Supreme Court of Appeals refused, without comment, the writ of prohibition sought by the Petitioners. Pet. App. 1a-2a. In *Chemtall*, however, decided just one week later, the Court issued an opinion. That opinion makes clear that the West Virginia Supreme Court is unlikely ever to resolve the issues presented in the Petition. Amici argued, as Petitioners did in their case, that "the circuit court's procedure for awarding punitive damages violates [Amici's] due process rights as set forth in *Philip Morris* because it requires a jury to determine punitive damages without taking into account a plaintiff's individualized harm and prior to a finding of actual liability against any defendant." *Chemtall*, 2007 WL 4098937, at *4. The court found "no merit" to this argument. It reasoned that the

trial plan, "on its face, is not a clear error of law because it does not guarantee a result at odds with *Philip Morris*." *Id.* Because the trials have not yet occurred, the Court concluded that a decision on the constitutionality of punitive damages would be premature. *Id.*

That analysis, however, ignores the nature of the error and the inevitability of the due process deprivation that will occur as a result. It is the very structure here that causes the constitutional deprivation and forces early settlement. Where an unconstitutional structure causes an ongoing injury, federal review prior to completion of the proceeding is necessary and appropriate. *See Gibson v. Berryhill*, 411 U.S. 564 (1973).

The West Virginia Supreme Court of Appeals' unwillingness to consider these issues before trial only ensures the likelihood of harm to mass tort defendants like Petitioners and Amici. As Justice Benjamin ably explained in dissent, the court's decision to delay "consideration of the matters raised herein until an eventual [post-trial] appeal poses a distinct potential for prejudice to the due process rights of the petitioners." *Chemtall v. Madden*, No. 33380, 2007 WL 4098937 at *5 (W.Va. Nov. 15, 2007) (Benjamin, J., concurring in part and dissenting in part). As a practical matter, that prejudice is "not correctable on appeal." *Id.* Under these circumstances, the Court's failure to review the unconstitutional procedure "constrains the effective choices realistically available to the petitioners to such a degree as to implicate grave due process considerations." *Id.* at n.1. "By failing to confront the issues raised herein," Justice Benjamin concluded, the court is "acquiescing to a system whereby case management machinations and procedural chicanery rather than

substantive law and facts appear to determine the outcome of the litigation. *The right to defend yields to the need to settle.*" *Id.* (emphasis added).[8]

The instant petition presents this Court with the opportunity to correct a growing constitutional problem in mass tort litigation in the courts of West Virginia. Amici respectfully suggest that their experience litigating in those courts confirms the expanding problem and provides additional compelling reasons for granting the Petition. Review is warranted now.

8. *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements"); *In re Gen. Motors Corp. Pick Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir.) ("legalized blackmail").

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, Amici Curiae request that this Court grant the Petition for a Writ of Certiorari.

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APPENDIX

APPENDIX — MEMORANDUM ORDER OF THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA DATED JANUARY 9, 2007 RE: *STERN, et al. v. CHEMTALL INC., et al.*

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

Civil Action No. 03-C049M

WILLIAM K. STERN, et al.,

Plaintiffs,

v.

CHEMTALL INCORPORATED, et al.,

Defendants.

AND

Civil Action No. 02-C-58
(Boone County Circuit Court)

DENVER PETTRY and DEBRA PETTRY, et al.,

Plaintiffs,

v.

PEABODY HOLDING COMPANY, et al.,

Defendants.

Appendix

MEMORANDUM ORDER

This matter comes before the Court from the West Virginia Supreme Court of Appeals on a Decision filed December 2, 2004 which granted the relief sought through prohibition and vacated the September 26, 2003 Order of this Court certifying a seven-state class action for medical monitoring and punitive damages arising out of the alleged exposure of coal preparation plant workers to acrylamide-containing products. The Supreme Court of Appeals held that this Court's analysis in comparing West Virginia law with the applicable laws of the other states on strict liability, medical monitoring, disposing of these matters and protecting the interests of the parties. Therefore, the issues of liability and punitive damages will be bifurcated from medical monitoring and class certification issues.

1. Bifurcation of Liability and Punitive Damages Multiplier. The first phase of the trial will involve liability and whether the Defendants' actions and/or inactions justify punitive damages, and if so, what multiple of general damages will be assessed as a punitive damage multiplier as to each Defendant. Specifically, the following issues will be tried in the first phase of the trial.

a. Whether the Defendants, or any of them, had actual or constructive knowledge of the hazard posed by their acrylamide-containing products.

b. Whether or not the state of the medical, scientific, and industry knowledge throughout the time of Plaintiffs' exposure was such that Defendants, or any of them, could have reasonably foreseen that persons working with and around acrylamide-containing were at risk to sustain injury as a result of exposure to said products.

c. Whether or not Defendants, or any of them, failed to properly test their products.

d. Whether or not Defendants, or any of them, manufactured, processed, sold, and/or distributed unreasonably dangerous products.

e. Whether or not Defendants, or any of them, failed to adequately warn the Plaintiffs of the inherent dangers, if any, in their products.

f. Whether one or more of the Defendants failed to recommend and/or provide protective devices for use with its acrylamide-containing products.

g. Whether or not Defendants, or any of them, failed to provide instructions to foreseeable users of proper methods of handling of acrylamide-containing products.

h. Whether or not Defendants, or any of them, breached any continuing duty to warn Plaintiffs.

i. Whether or not the acrylamide-containing products manufactured and sold by the Defendants, or any of them, were not reasonably safe (strict liability in tort) as manufactured or marketed.

j. Whether or not the Defendants, or any of them, acted in such a manner as to justify punitive damages.

k. If any Defendants' actions or inactions were of such a nature as to justify punitive damages, what multiple of general damages would suffice as a deterrent of future actions against that particular Defendant.

2. Causation and Damages. Should Plaintiffs prevail on the issue of liability, the parties will proceed in the second phase to try the issues of medical causation, medical monitoring viability, and damages.

3. Timing for Discovery and Pretrial Matters. The following shall be established and observed as to discovery and other activity in this matter up through and including the first phase of the trial by a jury.

a. **February 1, 2007:** Plaintiffs shall serve a list of proposed fact witnesses.

b. **March 3, 2007:** Defendants shall serve a list of proposed fact witnesses.

c. **April 3, 2007:** Plaintiffs shall designate all liability and punitive damages expert witnesses and provide Rule 26(b) information.

d. **May 5, 2007:** Defendants shall designate all liability and punitive damages expert witnesses and provide complete Rule 26(b) information as to each expert designated.

e. **September 1, 2007:** The parties will exchange witness and exhibit lists for trial.

f. **September 30, 2007:** All discovery shall be completed.

g. **October 15, 2007:** All dispositive motions, *Daubert/Wilt* motions in limine, summary judgment motions, or other pretrial motions, with supporting memoranda shall be filed. This provision should not be construed to prohibit the filing of any dispositive or other motions at any earlier point in time. In the event of such filing, responses will be due in the time provided by the Rules.

h. **October 29, 2007:** Non-movants shall respond with supporting memoranda to any dispositive or other pretrial motions.

i. **November 5, 2007:** Replies to any such motions shall be filed.

j. **November 15, 2007** at 1:30 p.m.: A hearing on all dispositive or other pretrial motions will be held, if appropriate.

k. **November 26, 2007** at 10:00 a.m.: Pretrial Conference. All parties are directed to exchange and deliver their respective pre-trial conference memoranda to the Court's Marshall County Office, with a courtesy copy for the Court, *no later than seven (7) days preceding* the conference. Said memoranda are to include at a minimum the following:

(1) Statement of the Case
(2) Issues of Fact
(3) Issues of Law
(4) Proposed Stipulations
(5) List of Witnesses
(6) Pending Motions

At the time of the Pretrial Conference the Court will determine when exhibits, *voir dire* questions, jury instructions, and any remaining motions *in limine* are to be filed by the parties.

l. **December 3, 2007:** First Phase of Trial begins.

4. Modification. In accordance with W.Va.R.Civ.P. 16(b), this Memorandum Order shall not be modified except by leave of the Court.

5. Sanctions. In accordance with W.Va.R.Civ.P. 16(f), the Court will impose the full spectrum of sanctions authorized by W.Va.R.Civ.P. if a party or party's counsel fails to obey this Order or other Orders or Rules of this Court.

6. Unless authorized by the Court the above dates are final.

7. Production of Documents. Unless otherwise agreed, when the parties are required to produce documents in response to discovery pleadings or for any other reason, they shall produce copies (via either paper copies, computer disk or other electronic means) of each document to all counsel of record, in both matters.

8. Preservation of Documents. During the pendency of this litigation, until further order of this Court, the parties shall take reasonable steps to preserve all documents within their possession, custody or control, including computer-generated and stored information and materials such as computerized data and electronic mail, containing information that is materially relevant to the subject matter of the pending litigation.

9. Communications Among Counsel. The Court recognizes that cooperation by and among counsel is essential for the orderly and expeditious resolution of this litigation. Accordingly, communications and information sharing among and between counsel for Plaintiffs and counsel for Defendants is encouraged, and shall not be deemed a waiver of the attorney-client privilege, attorney work-product privilege, or any other privilege. Any and all joint defense and joint prosecution agreements, in either *Stern* or *Pettry*, are hereby recognized and approved.

10. Protective Order. The protective orders governing production of materials in discovery previously entered into in either *Pettry* or *Stern* are deemed to be continuing and in effect; parties in these matters shall seek to add signatories to such agreements as necessary to allow all parties in either *Stern* or *Pettry* access/use of the material governed by such orders.

It is so ORDERED.

The Clerk shall transmit a copy of this memorandum order to all counsel of record.

Dated: this 9th day of January, 2007.

s/ John T. Madden
JOHN T. MADDEN, JUDGE